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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-2211

JOHN ROBERT OWENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN ROBERT OWENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

John Robert Owens, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on February 26, 1975.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, infra, p. 27) is recorded in _____

F.2d _____, No. 74-2211 (4th Cir. February 26, 1975). The case in the District Court below was heard at the September 10, 1974, session of the United States District Court for the Middle District of North Carolina, Greensboro Division, and the opinion of said Court was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1975. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER OR NOT AN OFFICER OF A CORPORATION CAN BE INDICTED FOR FORCIBLE RESCUE OF SEIZED CORPORATE VEHICLES UNDER 26 U.S.C. 7212(b) UPON THE SOLE EVIDENCE THAT HE WAS IN A POSITION OF AUTHORITY AS PRESIDENT OF THE CORPORATION AND AT SOME POINT AFTER THE SEIZURE THE VEHICLES DISAPPEARED WITHOUT EXPLANATION?

2. WHETHER OR NOT THE REQUIREMENTS OF A FAIR TRIAL COMPEL THIS COURT TO ADOPT THROUGH ITS SUPERVISORY POWER A RULE TO PREVENT POSSIBLE PREJUDICE TO THE DEFENDANT RESULTING FROM THE SUBMISSION OF THE BILL OF INDICTMENT TO THE JURY FOR USE DURING ITS DELIBERATIONS?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment, United States Constitution

2. The statute under which Petitioner was prosecuted was 26 U.S.C. 7212(a)(b), which provides as follows:

> §7212. Attempts to interfere with administration of internal revenue laws
>
> (a) Corrupt or forcible interference.-Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or

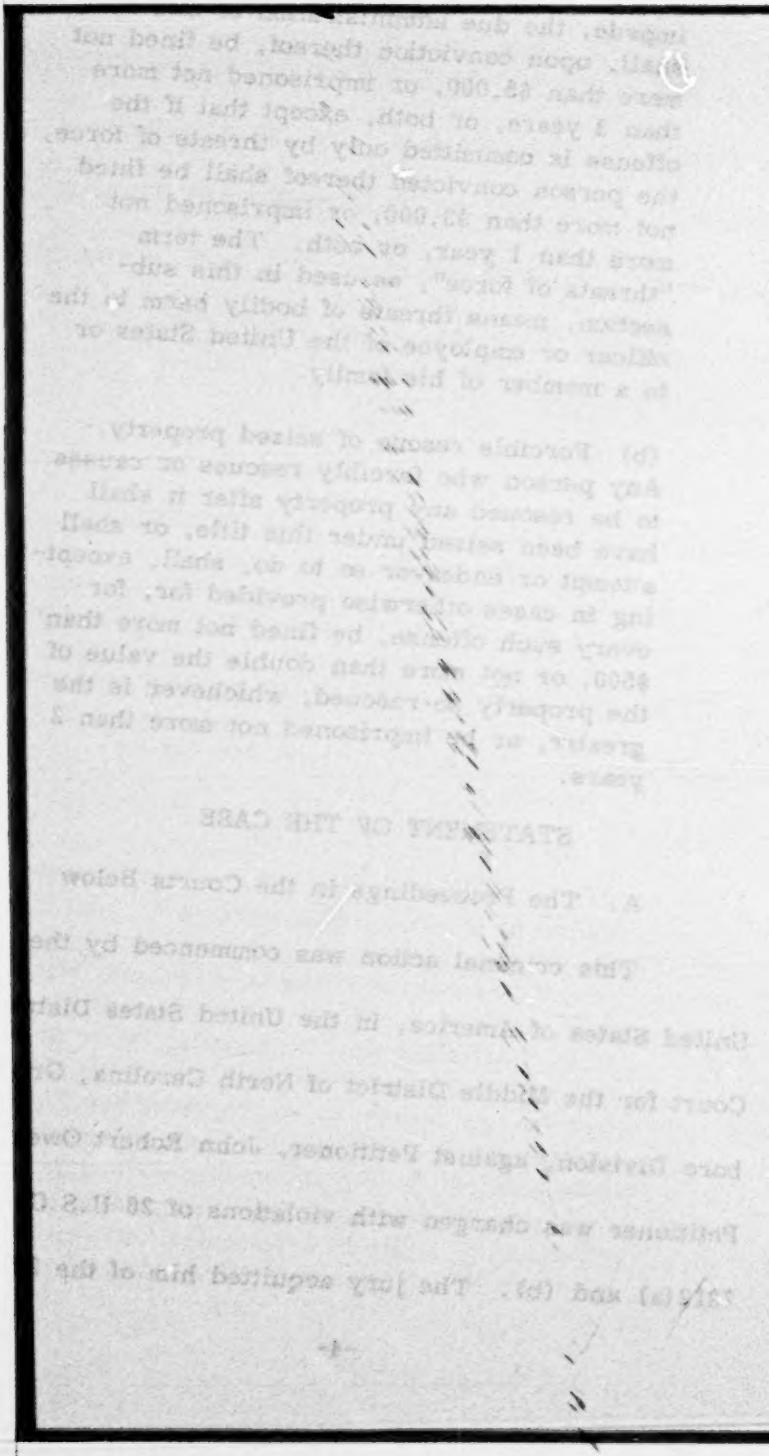
impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

(b) Forcible rescue of seized property.- Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

STATEMENT OF THE CASE

A. The Proceedings in the Courts Below

This criminal action was commenced by the United States of America, in the United States District Court for the Middle District of North Carolina, Greensboro Division, against Petitioner, John Robert Owens. Petitioner was charged with violations of 26 U.S.C. 7212(a) and (b). The jury acquitted him of the 26



U.S.C. 7212(a) charge of endeavoring to intimidate and impede by threats of force officers of the Internal Revenue Service. However, he was found guilty of the crime charged in 26 U.S.C. 7212(b), wilfully and unlawfully forcibly rescuing certain vehicles knowing them to have been seized by agents of the Internal Revenue Service.

On September 13, 1974, the District Court entered judgment finding the Petitioner guilty of violating 26 U.S.C. 7212(b) and sentencing him to imprisonment for a period of one (1) year.

Petitioner filed notice of appeal on September 18, 1974. The United States Court of Appeals for the Fourth Circuit entered judgment on February 26, 1975, affirming the conviction of the violation of 26 U.S.C. 7212(b), stating that although the evidence against Owens was circumstantial, it was sufficient for the jury to find beyond a reasonable doubt that Petitioner had committed the crime. Judge Russell dissented on the grounds that the evidence was insufficient to sustain a conviction.

Petitioner filed a Motion for Stay of Mandate on March 6, 1975, and an Order staying the mandate was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit on March 7, 1975.

B. The Factual Background

The Petitioner, John Robert Owens, is a citizen and resident of Alamance County, North Carolina. He is a stockholder in a corporation known as Owens Textiles, Inc. and serves as said corporation's president. (Tr. 130, 145). Petitioner was charged with violations of 26 U.S.C. 7212(a) and (b), the indictment reading as follows:

The Grand Jury charges:

COUNT ONE

> On or about December 6, 1973, in the County of Alamance, in the Middle District of North Carolina, JOHN ROBERT OWENS, by threats of force, did endeavor to intimidate and impede Ammie N. Martin, III, W. Wilson Cranford and N. Warren Wilson, officers of the Internal Revenue Service, Department of the Treasury, while the said officers were acting in an official capacity under Title 26, United States Code, in conducting an investigation into possible violations of the Internal Revenue Laws of

the United States, in violation of 26 U.S.C. 7212(a).

COUNT TWO

On or about December 7, 1973, in the County of Alamance, in the Middle District of North Carolina, JOHN ROBERT OWENS did wilfully and unlawfully forcibly rescue one 1961 Chevrolet truck, Vehicle Identification Number IC553B104189, one 1962 Mack truck, Vehicle Identification Number B67T5953, and one 1962 Highway trailer, Vehicle Identification Number 6E229748, and he then knew the said vehicles had been and still were seized by Agents of the Internal Revenue Service, in violation of 26 U.S.C. 7212(b).

A TRUE BILL:

_____

FOREMAN

_____

UNITED STATES ATTORNEY

The Government's evidence tended to show that Owens Textiles, Inc. owed the United States government $9,135.60 for unpaid employer's quarterly taxes. (Tr. 18). According to Government witnesses, when three (3) Internal Revenue Service officers went to the premises of Owens Textiles, Inc. and began to seize certain vehicles to effect collection of the taxes,

(Tr. 17, 54, 70, 134), Petitioner, through threats of force consisting of gesticulations and oral statements, endeavored to intimidate the officers. The jury acquitted Petitioner of the charges in Count One of the indictment.

Although the Government had no evidence of Petitioner's taking or possession of the three (3) vehicles which had been seized by the Internal Revenue Service agents, he was charged with the forcible rescue of those vehicles on or about December 7, 1973. The only facts introduced with regard to this Count of the indictment were the following:

(1) Petitioner was a stockholder and an officer of Owens Textiles, Inc., the place of business where the vehicles in question were located. (Tr. 130, 145).

(2) Petitioner did not have immediate supervision over the daily operations of Owens Textiles, Inc. (Tr. 131, 132).

(3) The Petitioner was not on the premises of Owens Textiles, Inc. on December 7, 1973. (Tr. 141, 144).

(4) There is no evidence that Petitioner took, drove, or otherwise directly or indirectly rescued the seized property. (Tr. 127).

The sole evidence relating to the rescue was that the officers seized the vehicles on December 6, 1973, returned on December 7, 1973, and found that the vehicles had disappeared. The District Court Trial Judge expressed this void of evidence relating to the rescue of the vehicles when it stated:

> All of the evidence, as I recall on that, is that when they went back the following day, December the 7th, that the vehicles were gone. (Tr. 127).

According to the District Court, three (3) essential elements must be proven in order to establish a violation of 26 U.S.C. 7212(b):

(1) lawful seizure of property by an Internal Revenue officer acting in his official capacity;

(2) that defendant rescued or attempted to rescue the seized property knowing that it had been seized by Internal Revenue officers; and

(3) that defendant did such act or acts

wilfully. (Tr. 256, 257).

The Government did not introduce any evidence relating to the second and third elements listed above. Nothing in the record indicates that Petitioner had possession of any of the vehicles at any time. There is a complete void in the evidence as to the location and the possession of the vehicles after December 6, 1973, until the time of the trial in District Court.

The District Court judge allowed the jury to take the indictment into the jury room over Petitioner's objection. The judge did instruct the jury that an indictment is only a formal method of accusing a defendant of a crime and is not evidence of any kind against him. (Tr. 251). However, the record shows that the indictment provided the only indication of forcible rescue. The Government did not provide any evidence of force or rescue under Count Two, and the alleged gesticulations and the statement made by Petitioner in relation to Count One, of which Petitioner was acquitted, were the only other evidence of force in

the record. This acquittal on Count One makes it more probable that sending the indictment to the jury room might have influenced the jury in its consideration of Count Two and operated to the substantial injury and prejudice of Petitioner in depriving him of a fair and impartial trial.

The per curiam opinion of the Fourth Circuit Court of Appeals, one (1) judge dissenting, stated that there was sufficient circumstantial evidence from which the jury could find Petitioner guilty beyond a reasonable doubt of violation of 26 U.S.C. 7212(b). Petitioner contends that there is no evidence in the record, circumstantial or otherwise, which could implicate him in the forcible rescue of the seized vehicles.

ARGUMENT

A. John Robert Owens petitions this Court for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit to review the Circuit Court's opinion affirming his conviction in Federal District Court of forcibly rescuing seized property. The Petitioner

contends that there is a complete lack of evidence of two elements of the crime, namely, the element of forcible rescue and the element of identity of the perpetrator of the rescue.

The function of the Supreme Court in reviewing criminal convictions is well established. This Court does not sit to review determinations by juries of disputed facts. Nor does this Court function to second-guess the trial judge in his determination of whether or not to submit a case to the jury or to dismiss it for insufficient evidence. But it is undeniably the duty of the Supreme Court to insure that individuals are not convicted upon indictments when the evidence is totally devoid of one or more elements of the crime. The leading case in this area is Thompson v. Louisville, 362 U.S. 199, 4 L.Ed 2d 654, 80 S.Ct. 624 (1960). Writing for a unanimous Court, Justice Black stated:

> The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment.

> Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.
>
> Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt.
>
> Thompson, supra, 4 L.Ed. 2d 654, 655, 659.

Petitioner contends that the "no evidence rule" of Thompson, supra, setting the standard for Supreme Court review of State convictions is equally applicable to review on certiorari to the Circuit Court of Appeals. The "no evidence rule" derives its justification from the fundamental principles of the Rule of Law. Before a person may be indicted for a criminal violation, the government must possess evidence that the accused committed the crime alleged.

Review by this Court of questions of this nature has been granted on numerous occasions in the past when it became clear from the total lack of evidence that the indictment and prosecution of the defendant in and of itself was totally groundless. Johnson

v. Florida, 391 U.S. 596, 20 L.Ed. 2d 838, 88 S.Ct. 1713 (1968); Shuttlesworth v. Birmingham, 382 U.S. 87, 15 L.Ed. 2d 176, 86 S.Ct. 211 (1965); and Garner v. Louisiana, 368 U.S. 157, 7 L.Ed. 2d 207, 82 S.Ct. 248 (1961). In a great number of these cases, there have been First Amendment overtones, which have supplied an additional incentive to grant certiorari. In this case, there are principles which are fundamental to any society governed by the Rule of Law and which are equally as important as First Amendment values. Just as the expression of ideas or the performance of acts which are unpopular may not be inhibited by criminal prosecutions, it is equally repugnant to the Constitution for individuals who are unpopular with the government to be indicted and tried for crimes for which there is no evidence. All citizens, regardless of their favor with the government, enjoy immunity from groundless prosecution. This Court has long been the last refuge for unpopular ideas and unpopular individuals.

Therefore, the underlying policies of Thompson,

supra, are equally valid in the present context of review of a decision of the Circuit Court of Appeals. Petitioner contends that the applicability of Thompson, supra, to "intra-federal" review has not been previously addressed by this Court and should be resolved.

Assuming that this level of review is an appropriate function of the Supreme Court, Petitioner turns to specific elements of this case further supporting his reasons for granting certiorari.

There is a dearth of cases construing 26 U.S.C. 7212(b). The only cases of which Petitioner is aware dealing with forcible rescue under 26 U.S.C. 7212(b) are: United States v. Oliver, 421 F.2d 1034 (10th Cir. 1970) and United States v. Scolnick, 392 F.2d 320 (3rd Cir. 1968). In the former case, defendant owed transportation taxes on trucks for two (2) separate years. Internal Revenue Service agents were in the process of towing away the truck in question when the defendant took the vehicle from them and transported it to his house. The trial court denied the motion

to dismiss and instructed the jury on seizure and rescue. Witnesses in this case saw the defendant take the truck from the agents and drive it away, so that the elements of force and rescue were proven.

In the Scolnick case, supra, the force used to rescue a safe deposit box which had been seized by the Government consisted of defendant's tossing a rock through the front window of a bank. Physical acts of force and actual possession of the lawfully seized goods were present in this case.

In both Oliver and Scolnick, supra, identification of the rescuer was not in issue, and the question involved was the sufficiency of force and not the existence of any force whatsoever. In the present case, Petitioner argues that review is necessary by this Court to determine whether or not an officer of a corporation can be indicted for forcible rescue of seized corporate vehicles under 26 U.S.C. 7212(b) upon the sole evidence that he was in a position of authority as president of the corporation and at some point after the seizure the vehicles inexplicably disappeared. The bill of

indictment charges that Petitioner:

> On or about December 7, 1973, in the County of Alamance, in the Middle District of North Carolina, JOHN ROBERT OWENS did wilfully and unlawfully forcibly rescue one 1961 Chevrolet truck, Vehicle Identification Number IC553B104189, one 1962 Mack truck, Vehicle Identification Number B67T5953, and one 1962 Highway trailer, Vehicle Identification Number 6E229746, and he then knew the said vehicles had been and still were seized by Agents of the Internal Revenue Service, in violation of 26 U.S.C. 7212(b).

Of course, individuals may be indicted on circumstantial evidence not directly identifying the accused. In the present case, however, there is no evidence, circumstantial or otherwise, which tends to identify Petitioner or to distinguish him from any other officer or employee of the corporation as being the perpetrator of the rescue.

In Count One, Petitioner was accused of "intimidating and impeding" officers of the Internal Revenue Service in their official duties. Admittedly, the Petitioner was present and talked with Internal Revenue Service agents on December 6, 1973, at Owens Textiles, Inc. The jury acquitted Petitioner of all charges

under Count One. Had he been convicted of Count One, the Petitioner would not presently be asking this Court for review. However, the complete acquittal of forcible threats under Count One coupled with the verdict of guilty of forcible rescue under Count Two, for which there was not one scintilla of evidence, leads the Petitioner to conclude that the jury compromised its verdict in finding him guilty. Since there was nothing from which the jury could conclude that John Robert Owens forcibly rescued seized trucks other than the accusations in the indictment itself, he respectfully petitions this Court for certiorari.

In a cursory per curiam opinion the Circuit Court, with Judge Russell dissenting, affirmed the Petitioner's conviction without discussing the problems raised here by the Petitioner. Nor did Judge Russell express his reasons for believing the evidence insufficient to sustain a conviction.

In summary, the reasons that this Court should grant the writ of certiorari in this case are two-fold.

First, the "no evidence rule" justifies this Court in exercising the purely judicial function of reviewing the record to see if the indictment of Petitioner was based on any evidence at all. Secondly, 26 U.S.C. 7212(b) has been applied in such a fashion as to subject persons in positions of authority to indictment and possible conviction on the mere fact of disappearance of seized vehicles. To sanction such an application of this statute is to invite prosecution of individuals who may be disagreeable to Internal Revenue Service agents, but who have committed no offense.

B. The Petitioner offers a second question deserving review by this Court. Over the objection of Petitioner's counsel, the trial judge permitted the jury to use a copy of the bill of indictment during its deliberation. The Petitioner contends that submission of the indictment to the jury was undoubtedly prejudicial and that this Court should adopt a procedure to be followed in federal criminal trials to protect against such potential prejudice.

This Court is empowered to formulate such a rule pursuant to its supervisory power over procedure followed in federal criminal trials.

In discussing this Court's supervisory power, Justice Frankfurter stated in McNabb v. United States, 318 U.S. 332 (1943):

> While the power of this Court to undo convictions in state courts is limited to the enforcement of . . . 'fundamental principles of liberty and justice' . . ., the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force.

Since this petition is not the result of a case originating in a state court, the Petitioner will not urge that this Court examine his contentions under the standards traditionally applicable to review under the due process clause of the Fifth Amendment.

In addition to the inherent rule-making power of this Court, other considerations supporting review by certiorari include the lack of statutory provision or definitive judicial precedence on the issue. The traditional function of this Court in establishing prophylactic rules in situations where there is a potential for substantial prejudice without the means of proving such prejudice is another reason why review by certiorari should be granted.

The three rules relevant to the issue of submitting the indictment to the jury are Rules 7, 26 and 52 of the Federal Rules of Criminal Procedure. Rule 7 deals with the use of an indictment; Rule 26 applies the common law rules of evidence to trials; and Rule 52 deals with harmless error. These three rules do not specifically address the question raised by Petitioner.

There is also a lack of precedence from this Court concerning sending the indictment to the jury room. The Petitioner did not discover any cases

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from the Supreme Court and found very few from the Circuit Courts addressing this problem. Although there are not any Circuit Court cases which have held that submission of the indictment is prejudicial error, the Seventh Circuit reasoned analogously in United States v. Grady, 185 F.2d 273 (10th Cir. 1970). It was held in Grady, supra, that the affidavits attached to an information sent to the jury should be excluded because they tended to assert the truth of the government's contentions, and the court stated its reasoning for reversal at page 275:

> True, it is possible that the defendant suffered no harm by reason of the affidavit going to the jury; in fact, it could be that the affidavit was not seen by a single member of the jury. On the other hand, it could and it might have been used effectively in persuading jurors otherwise doubtful or opposed to conviction to agree to a verdict favorable to the government. And it is sufficient to require a reversal if, in our judgment, the error might have operated to the substantial injury of the defendant.

Similarly, the indictment of Petitioner stated as true the essential facts in dispute. This added impetus could only operate to the detriment of a

criminal defendant.

Petitioner contends that the lack of statutory or case law dealing with this issue provides this Court with ample justification for addressing the question.

An additional inducement for review is the unique function of this Court to establish prophylactic rules to deal with situations in which the possibility of prejudice is high but the actual existence of prejudice is difficult to prove. As Justice Black stated in In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), "our system of law has always endeavored to prevent even the probability of unfairness." The potential for prejudice is high in cases, such as the present case, where the evidence is entirely circumstantial. The Petitioner contends his conviction was based on no evidence whatsoever and the accusations contained in the indictment must have been determinative.

Under our system of justice, the defendant

is presumed innocent. This presumption is eroded when the petit jury has in its possession an official document issued by the Grand Jury and marked a "true bill". It is reasonable to assume that the effect upon lay jurors, who may misunderstand the purpose of an indictment, is prejudice to the defendant.

Of course, the secret deliberations of the jury make it impossible to determine what effect, if any, the indictment may have had. The impossibility of knowing what effect the indictment may produce coupled with the high possibility for prejudice to the defendant make it appropriate for this Court to fashion a rule prohibiting the jury from examining the indictment.

The rationale supporting the submission of the indictment to the jury is that it assists the jury in recalling the elements of the crime charged. However, there is an alternative means available which accomplishes the stated purpose and does not present the degree of prejudice to the defendant.

Similar to civil cases, the jury could be given a separate sheet with the charge and all lesser included offenses set out. This would clarify the elements without placing undue emphasis on the Government's contentions, which have been given additional weight by the Grand Jury's calling the indictment a "true bill".

Petitioner was acquitted of Count One in spite of direct evidence by government witnesses. The fact that he was convicted of Count Two upon no evidence points up the importance of the proposed procedure to the fair trial of a defendant.

It is respectfully urged that this Court grant review on this question for the purpose of deciding the desirability of fashioning a rule such as the Petitioner proposes.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

SEAWELL, POLLOCK, FULLENWIDER, VAN CAMP & ROBBINS, P. A.

Counsel for Petitioner

By: James R. Van Camp

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(919) 692-7811

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2211

United States of America, Appellee,

-v-

John Robert Owens, Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Argued February 7, 1975. Decided February 28, 1975

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

James R. Van Camp (H. F. Seawell, Jr.; Seawell, Pollock, Fullenwider, Van Camp & Robbins; and Mitchell McEntire, Harris & McEntire on brief) for appellant; N. Carlton Tilley, Jr., United States Attorney for the Middle District of North Carolina (Benjamin H. White, Jr., Assistant United States Attorney on brief) for appellee.

PER CURIAM:

John Robert Owens appeals from his conviction of violating 26 U.S.C. §7212(b), forcibly rescuing certain vehicles which had been seized by Internal Revenue Service agents.

The evidence presented against Owens was circumstantial. However, we conclude that it was sufficient for the jury to find beyond a reasonable doubt that Owens had committed the crime. Cf. United States v. Chappell, 353 F.2d 83, 84 (4th Cir. 1965). We find no cause for reversal in Owens' other assignments of error.

Judge Russell, believing the evidence insufficient to sustain a conviction, dissents.

AFFIRMED.

AFFIRMED.

PER CURIAM:

John Robert Owens appeals from his conviction of violating 26 U.S.C. §7212(b), forcibly rescuing certain vehicles which had been seized by Internal Revenue Service agents.

The evidence presented against Owens was circumstantial. However, we conclude that it was sufficient for the jury to find beyond a reasonable doubt that Owens had committed the crime. Cf. United States v. Chappell, 353 F.2d 83, 84 (4th Cir. 1965). We find no cause for reversal in Owens' other assignments of error.

Judge Russell, believing the evidence insufficient to sustain a conviction, dissents.

AFFIRMED.

AFFIRMED.

PER CURIAM:

John Robert Owens appeals from his conv
tion of violating 26 U.S.C. §7212(b), forcibly re
ing certain vehicles which had been seized by Int
Revenue Service agents.

The evidence presented against Owens was
circumstantial. However, we conclude that it was
sufficient for the jury to find beyond a reasonable
doubt that Owens had committed the crime. Cf.
United States v. Chappell, 383 F.2d 83, 84 (4th Cir.
1967). We find no cause for reversal in Owens'
other assignments of error.

Judge Russell, believing the evidence in-
sufficient to sustain a conviction, dissents.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	JUDGMENT AND COMMITMENT
	)	
JOHN ROBERT OWENS	)	CR-74-171-G

On this 13th day of September, 1974, came the attorney for the Government and the Defendant appeared in person and by Mitchell McEntire, James Van Camp and Herbert F. Seawell, Jr., counsel.

IT IS ADJUDGED that the Defendant, upon his plea of not guilty and a verdict of guilty has been convicted of the offense of wilfully and unlawfully forcibly rescuing vehicles when he knew the said vehicles had been and still were seized by agents of the Internal Revenue Service, in violation of 26 U.S.C. 7212(b) as charged in Count Two of the indictment, and the Court having asked the Defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the

APPENDIX B

contrary being shown or appearing to the Court.

IT IS ADJUDGED that the Defendant is guilty as charged and convicted.

IT IS ADJUDGED that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year.

IT IS ORDERED that the Defendant be acquitted as to Count One.

IT IS FURTHER ORDERED that the Defendant report to the United States Marshal in Greensboro at ten o'clock a. m. on September 18, 1974.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer, and that the copy serve as a commitment of the Defendant.

/s/ Hiram H. Ward
Hiram H. Ward
United States District Judge

Carmon J. Stuart,
Clerk

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was this date served on the attorney of record for Respondent, and on the Solicitor General, pursuant to Rule 33(1) and (2)(a) of the Rules of the Supreme Court of the United States, by depositing one (1) copy of same in the United States Mail, postage prepaid, addressed to:

Mr. Benjamin White
Assistant United States Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

The Solicitor General
Department of Justice
Washington, D. C. 20530

This the 28th day of March, 1975.

SEAWELL, POLLOCK, FULLENWIDER,
VAN CAMP & ROBBINS, P. A.

Attorneys for Petitioner

BY: James R. Van Camp

James R. Van Camp
Post Office Box 30
Southern Pines, North Carolina
28387

(919) 692-7811

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1231

JOHN ROBERT OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was convicted on insufficient evidence and that he was prejudiced by submission of the indictment to the jury during its deliberations.

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of attempting to interfere with the administration of the internal revenue laws by causing the forcible rescue of property seized by the Internal Revenue Service ("IRS"), in violation of 26 U.S.C. 7212 (b).[1] He was sentenced to a term of one years' imprisonment. The court of appeals affirmed (Pet. App. A).

[1]Petitioner was acquitted by the jury on a charge of intimidating and impeding IRS officers in their official duties, in violation of 26 U.S.C. 7212(a).

1. Petitioner is president and a stockholder in Owens Textiles, Inc. of Alamance County, North Carolina (Tr. 130, 145). At the time of the pertinent events, the company owed to IRS several quarterly tax accounts.[2] On December 6, 1973, three IRS agents drove to the company's plant with a levy to enforce collection of the account owed for the quarter ending June 30, 1973, in the amount of $9,135.60. These officials included Cranford, the local agent; Wilson, his supervisor; and Martin, who had been ordered to assist in the enforcement. Cranford had unsuccessfully attempted for approximately six weeks to obtain collection (Tr. 71). Upon arrival at the plant, the agents went to the company office and asked the secretary for petitioner. When she was unable to locate him, Cranford explained the purpose of the visit, read the levy, and gave her a copy. The three agents then went to the parking lot to identify and seize several of the company's vehicles. They did so by placing official United States Government warning stickers on the vehicles.[3] At this point, petitioner arrived and said to Cranford (Tr. 36): "What are you trying to do, put me out of business?"

Cranford said that the matter was out of his hands and was being handled by his supervisor. Petitioner then asked Wilson for additional time in which to pay the liability, but Wilson said that enforcement action would be taken that day.

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[2]The company had repeatedly failed to pay the withholding (employment and Social Security) taxes from the time of its formation in 1972.

[3]The sticker bears the following legend: "SEAL, WARNING UNITED STATES GOVERNMENT SEIZURE. This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property in any manner, under severe penalty of the law."

While this discussion was taking place, another truck arrived. When Wilson climbed into its cab to place the official warning sticker on the windshield, petitioner ran from the office and said that he needed the truck for local deliveries. Wilson replied that all of the vehicles were under government seizure. At this point, petitioner, who appeared emotionally upset (Tr. 24, 86, 91), told the agents: "I don't want to kill anybody, but you're taking everything that I've got, and I don't see that I have anything to lose" (Tr. 24, 26, 56, 63, 90). He also made a menacing gesture[4] that caused the agents to fear that he had a gun and would use it (Tr. 26, 64, 91). Acting in accordance with established agency policy, the agents immediately left without completing their previously-made arrangements to have the vehicles towed away. Wilson reported the incident to his superiors, and later in the day an inspector from IRS's Internal Security Division came to Burlington to investigate the incident and to protect the IRS employees (Tr. 236-237).

The same day, petitioner went to the IRS office in Burlington and paid $1,200 on the delinquency. He asked Wilson: "Now what are you going to do?" Wilson replied that the day's events had already been reported to the district office in Greensboro and that it was "out of his hands" (Tr. 28). According to Wilson, petitioner said "that whatever happened to him would be a result of what I told on him, and that he wanted me to know that he would hold me personally responsible for whatever happened to him" (Tr. 29).

The next day, the IRS investigator arrested petitioner on a charge of endeavoring to intimidate and impede the three IRS officers by threats of force, in violation of 26 U.S.C. 7212(a); the agents returned to the plant to remove the vehicles that had been seized the previous day

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[4]As petitioner spoke, he stuck his right hand into his right rear pants pocket, and, with his left hand, waved back two employees approaching the area.

and found that they were gone. Petitioner was then indicted for forcibly rescuing the seized vehicles, in violation of 26 U.S.C. 7212(b).

At trial, petitioner denied making threats, claimed at first to have "no idea" who moved the trucks, but then added that some of the truck drivers probably did. He admitted knowing that local deliveries were made after December 6.

2. Tested by traditional standards (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was sufficient to support petitioner's conviction. As this Court has stated, "the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland* v. *United States*, 348 U.S. 121, 140.

Given the fact that the seized vehicles were removed from the company premises, the task before the jury was to weigh the probability of petitioner's guilt against the likelihood that someone else was responsible for their removal. The evidence established that petitioner had sole and complete authority for the company's activities. It is a reasonable inference that he was the only person possessing the authority to cause the rescue. Petitioner's motivation to do so was amply demonstrated by his outbursts in the parking lot and in the IRS office. The vehicles were removed within 24 hours of his confrontation with the agents—a short enough time span for the jury to conclude that petitioner had not "cooled off."

Petitioner erroneously invokes *Thompson* v. *Louisville*, 362 U.S. 199 (Pet. 12-15). *Thompson* stands for the proposition that a conviction "totally devoid of evidentiary support" violates due process. *Ibid.* Accord, *Douglas* v. *Buder*, 412 U.S. 430, 432; *Vachon* v. *New Hampshire*, 414 U.S. 478, 480. But that principle applies only where

the record contains no evidence from which the fact-finder might reasonably infer the existence of the necessary elements of the offense. This is not such a case.

3. Petitioner's claim (Pet. 11-19) that there was no evidence of use of force within the meaning of 26 U.S.C. 7212(b) is also without merit. It has been held that "forcible rescue" is not limited to proof of force against persons and includes the removal and destruction of seizure tags and removal of seized property. *United States* v. *Scolnick*, 392 F. 2d 320, 327 (C.A. 3), certiorari denied *sub nom. Brooks* v. *United States*, 392 U.S. 931.

4. Petitioner's contention (Pet. 19-25) that the court abused its discretion in permitting the jury to take the indictment into the jury room is insubstantial. See *United States* v. *Downen*, 496 F. 2d 314, 320 (C.A. 10), certiorari denied, 419 U.S. 897. The jury was instructed that the indictment "is not evidence of any kind against the accused" (Tr. 251) and, as petitioner acknowledges (Pet. 22), no court of appeals has held sending the indictment to the jury to be prejudicial error.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[5]Petitioner's acquittal on one of the two counts militates against any claim of inherent prejudice.